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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

ANNE ARUNDEL COUNTY, MARYLAND,

*Petitioner*,

v.

JOHN D. WEST, ET AL.,

*Respondents*,

UNITED STATES OF AMERICA,

*Intervenor*.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

## BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Do "fire protection activities" under the Fair Labor Standards Act include emergency medical services when a local government operates its fire and rescue service with medical services provided as an integral part of the fire and rescue service?

2. Is a local government better able than the federal government to define the scope of fire protection services?

## LIST OF PARTIES

The Petitioner in this proceeding is Anne Arundel County, Maryland. Respondents are John D. West; Marianne C. Anderson; Michael C. Andresky; Susan L. Bailey; Brian L. Bond; Charles W. Boyer; Richard A. Brock; Daniel Brown; Anthony W. Burke, Sr.; Tracy L. Burke; Guy Steven Childers; Kim J. Cissna Ross; Riccardo Colella; Larry P. Collison; Michael Albert Connor; Michael E. Cox, Jr.; Timothy Crawford; Anita Y. Dunham; Michele Delalla; Grafton G. Dietz, Jr.; James H. Edwards, Jr.; Mara L. Eicens; Wayne Eisenhardt; Karen Estepp; Douglas G. Fishel, Jr.; Terry A. Gero; James L. Glime; James E. Goetz; Jeffrey P. Gormley; John Greene; Kathleen D. Grote; Russell Lloyd Harris; Sharon M. Henry; Michael William Herz; Lisa Ann Housand; Joseph M. Huber; William W. Isennock; Daniel L. Jarzynski; C. Edward Jett; Robert Frederick Johnson; Stephen E. Jones; Richard Allen Joy; Clifford C. Kooser II; James David Kruger; Douglas P. Marshall; Michael J. Marsiglia; William L. Merson; Timothy L. Mikules; Michael Steven Moore, Jr.; Greg A. Novak; George L. Pfeffer, Jr.; Noldon Pope; Mark Steven Praschak; Patrick O. Prendergast; Carol Ann Rabinowitz; Cynthia Ray Ell; Hurshel W. Shank, Jr.; Cecilia W. Sledgeski Warren; Gregory Lee Smith III; Randolph S. Spies; Thomas Stag; Peter G. Staley; Logan Starr, Sr.; Frank R. Stamm; David Sterling; Michael Swain; Keith D. Swindle; John Steven Thompson; Timothy Aldyn Tucker; Robert T. Vaccaro, Jr.; Robert Valderas; Marcus D. Wallace; William H. Ward; Khris Edwin Wildt; William Mark Wilhelm; David K. Williams; Raymond J. Schmidt; Kimberly S. Schneider; Michael Andrew Smith; John B. Wellman; Robert A. Harsh; Robert Anthony Mead; James Carroll Rostek, Sr.; Rand J. Lindgren; Raymond Gene Cullison, Jr.; Dawn Rodriguez; David R. Klinger;

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## CORPORATE DISCLOSURE

Montgomery County, Maryland, is a body corporate and politic, organized under the laws of the State of Maryland and the Charter of Montgomery County, Maryland, and as such has no corporate parents or subsidiaries.

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Montgomery County, Maryland, respectfully supports the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals is reported as *West v. Anne Arundel County, Md.*, 137 F.3d 752 (4th Cir. 1998), 135 Lab. Cas. P33,647, 4 Wage and Hour Cas. 2d (BNA) 641 (Feb. 18, 1998) (No. 96-1280, 96-1251). The opinions of the district court are unreported. All of these opinions appear in the appendix to the petition filed by Anne Arundel County.

## JURISDICTION

The court of appeals has entered its judgment, which this Court may review by issuing a writ of certiorari to exercise jurisdiction of this case under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The *amici curiae* adopt the provisions set forth in the petition for writ of certiorari.

## STATEMENT OF THE CASE

Montgomery County is a political subdivision of the State of Maryland and exercises the powers of local government and home rule provided by the Maryland Constitution. Md. Const. art. XI-A; Md. Ann. Code, Art. 25A (1998). The County provides fire and rescue services to its community.

Even when the FLSA was amended to apply to firefighters, the duties of the local fire department included non-fire tasks. Fire personnel were as likely to be called to a fire as they were to help remove raccoons that had entered a home or to bail water from a flooded basement. Whatever the emergency, citizens were likely to call the fire department first. This multifaceted role of helping the community in any emergency situation has become more focused, and fire and rescue services twenty years later include fire suppression, hazardous materials, urban search and rescue, and emergency medical services. As the needs of the community have expanded, so have the training and services associated with fire protection. Recognizing these needs, Montgomery County trains its fire and rescue employees not only to extinguish fires, but also to provide emergency medical assistance and to employ rescue techniques in a variety of situations.

The scope of fire protection services has evolved to include emergency medical care as an integral part of providing safety to the neighborhood. Fire prevention has become the focus of fire and rescue services, with the goal of eliminating fires by installing fire sprinklers and ensuring early detection by using smoke detectors. The reduction in fires in recent years is a reflection of the success of the mission pursued by the fire and rescue service.

An indirect result is that fewer fire and rescue service personnel respond to actual fires—regardless of whether they are firefighters or emergency medical providers. On the other hand, many responses include both firefighters and medical personnel. Even a car accident, which may require only medical treatment, generates response by firefighting personnel and equipment along with emergency medical vehicles and

personnel. Similarly, a fire department would be hindered greatly without having firefighters available who are trained to provide emergency medical services. Each aspect of these "fire protection services" are integral to the local fire and rescue services. The plain meaning of the FLSA recognizes these activities as parts of a whole rather than independent functions.

## REASONS FOR GRANTING THE PETITION

To achieve complete fire protection, Montgomery County has chosen to train all personnel as firefighters and emergency medical technicians, while many personnel also obtain advanced training in these areas. This means that all personnel may be assigned to firefighting tasks, while those with the additional training may be assigned to firefighting tasks or emergency medical tasks or some combination of the two. Regardless of the particular assignment, these employees work together on the same shifts and respond from the same fire station—often to the same incidents, whether fires or personal injuries. The court of appeals failed to recognize the symbiotic relationship of these duties, despite the recognition of these functions by the FLSA as exempt public safety functions.

This Court should hear this case to clarify the ability of a local government to establish a fire and rescue service that includes emergency medical services as an integral part of the operation, without fear that the performance of emergency medical services will be calculated as a non-exempt function. The reference to the term "fire protection services" must be interpreted to include functions other than firefighting, and this Court can clarify the scope of that phrase. Moreover, principles of federalism support the authority of local governments to

determine what fire protection tasks are sufficiently interrelated that they qualify as exempt functions.

## I.
## THE FLSA ACCOMMODATES THE HISTORICAL EVOLUTION OF FIRE PROTECTION SERVICES

In 1973, the National Commission on Fire Prevention and Control issued a report on fire safety in the United States. As a result of the recommendations in the report, the National Fire Academy was established. The NFA works to enhance the ability of fire and emergency services and allied professionals to handle fire and related emergencies more effectively. The NFA does not distinguish between fire and non-fire emergencies, but provides training to address the various possibilities facing today's fire protection personnel.

In addition to recommending increased fire prevention activities and fire safety education, the Report of the Commission also recognized that emergency ambulance and paramedical service met the criterion of utilizing a firefighter's special capabilities. *America Burning*, The Report of the National Commission on Fire Prevention and Control, p. 38 (1973). The Report further recognized that the firefighters might respond to non-fire emergencies and that combining firefighting and paramedic services was efficient and would enhance the value of the fire department. *Id.*

Consistent with the Report, Montgomery County describes the duties within the scope of the Fire and Rescue Service to include fire, rescue, and emergency medical services and training. These systems are designed to ensure that fire and rescue personnel work together in an integrated manner. As a

practical matter, this makes sense. When a 911 call is received, a variety of services may be required—fire suppression, rescue, and/or emergency medical services. Of this group of personnel, no one knows whether or for how long they will be needed at the scene when they arrive, yet all are part of the minimum staffing provided by the respective counties.

The court of appeals' view that a public safety employee must engage in fire suppression for 80% of their on-duty time creates an artificial distinction between the responsibilities of fire protection personnel. No doubt, there are duties that realistically fall within the non-exempt category. For example, a fire officer who handles training or who handles disciplinary actions may be performing non-fire protection activities for more than 80% of their assigned duties. These duties fit within the typical desk jobs for which the public safety exemption does not apply.

The situation differs when fire and emergency medical personnel work in the same station, handling the same housekeeping tasks, while awaiting and often responding to the same calls. The fundamental nature of these tasks is to be on standby and to respond quickly when someone has called for emergency help. When the personnel have been trained interchangeably and may be assigned to interchangeable tasks, there should be no distinction between how many fires each individual responded to within a certain period. That result would interfere with the right of management to choose where to assign its employees. Moreover, this type of characterization would ignore the non-fire emergencies to which the public expects fire personnel to respond, such as a car accident involving personal injuries but no fire.

The distinction only makes sense when it is made between those employees working at the fire station and those in an office setting, such as the headquarters. Any attempt to treat firefighters and the emergency medical personnel who accompany them differently conflicts with the intent of the FLSA and with the longstanding practice of fire companies.

The proper interpretation of "fire protection activities" recognizes that rescue and ambulance service is included in these activities as long as the functions are an integral part of the fire protection activities—this view does not require measurement of the percentage of fires compared to the number of other emergencies, but contemplates a cohesive system that provides the services. *See e.g. Christian v. City of Gladstone*, 108 F.3d 929 (8th Cir. 1997); *Bond v. City of Jackson*, 939 F.2d 285 (11th Cir. 1991).

In *Christian, supra*, the court of appeals acknowledged that firefighting and emergency medical services are indistinguishable under the FLSA, so that "[p]roviding paramedic services on accident and medical emergency calls not stemming from a fire or car accident does not alter the nature of their duties or cause them to perform tasks unrelated to their job." 108 F.3d at 934. Similarly, in *Bond*, the court recognized the Department of Labor's explanation that the exemption in the FLSA § 207(k) includes rescue and ambulance personnel that are an integral part of the fire service, and has required only that they be dispatched regularly to fires or accidents—no percentage of each type of emergency has been required. 939 F.2d at 287.

Non-exempt work includes clear non-fire protection activities, such as, forest firefighters who plant trees, labor

relations officers, training officers and other non-fire protection tasks. Emergency medical services, however, are every bit as incidental and integral to fire protection activities as the maintenance of equipment and housekeeping functions that fill the time awaiting the next emergency call. In fact, emergency medical services can no more be segregated from fire protection activities than the rescue efforts performed by fire personnel.

## II.

## THE STATES AND LOCAL GOVERNMENTS ARE BETTER ABLE THAN THE NATIONAL GOVERNMENT TO IDENTIFY AND PERFORM ACTIVITIES THAT DO NOT INVOLVE INTERSTATE COMMERCE

The provision of fire protection services historically has been a local function. The application of the FLSA to this inherently local service interferes with the counties' authority to provide these services to the community and further interferes with validly negotiated agreements between the local government and its emergency personnel. To permit the FLSA to impact a local government's operations in this way violates constitutional principles of federalism.

In *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), this Court recognized its analysis in *National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by Garcia, supra*, where this Court emphasized that fire prevention activities are "remote from any normal concept of interstate commerce, . . . [and] that [they] epitomize the concerns of local, democratic self-government. . . ." *Id.* at 575-76. This Court further concluded that the states and local governments were better able to perform these functions than

the federal government. *Id.* Certainly, this view verifies the local nature of fire and rescue services and, in turn, precludes an interpretation that would include these activities within the scope of interstate commerce.

This interference cannot realistically be compared to that of private companies, because those companies are not entitled to the protections that a local government receives under principles of federalism. To allow the court of appeals to interfere with an admittedly local function by its overly narrow statutory interpretation conflicts with prior holdings of this Court. No dispute exists as to whether the provision of fire protection services remains a function of local government. Yet, the court of appeals' decision severely affects the provision of these services by increasing the cost of providing emergency medical services due to alternate work schedules or overtime compensation. In addition, the court of appeals' decision effectively nullifies the existing agreements that have been negotiated with fire protection personnel in a way that private companies do not experience.

This artificial distinction ignores the inherently local nature of these functions and allows an unwarranted level of interference by the federal government. The FLSA does not provide for the differences between the various organizations within a particular state, let alone contemplate the many diverse methods throughout the country for providing fire protection. Interstate commerce suffers no harm from the exclusion of local governments from this aspect of the FLSA, yet the local governments lose control of one of their most significant functions if the court of appeals' decision remains unaddressed.

## CONCLUSION

For the foregoing reasons, along with those set forth in the petition filed by Anne Arundel County, Montgomery County requests that this Court issue a writ of certiorari to consider this case.

Respectfully submitted,

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